IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 186 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME-TAX

Versus

SHARDABEN MANSUKHLAL

Appearance:

1. INCOME TAX REFERENCE No. 186 of 1988

MR AKIL KURESHI with MR MANISH R BHATT for Petitioner No. 1

MR BD KARIA for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE D.A.MEHTA

Date of decision: 25/10/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In this reference at the instance of the revenue, the following question is referred for our opinion in respect of assessment year 1981-82:-

"Whether the Appellate Tribunal is right in law in cancelling the order made by the C.I.T u/s.263 of the I.T. Act, 1961 ?"

2. The facts giving rise to this reference, briefly stated, are as under:-

2.1. The Income-tax Officer completed the assessment on the returned income of Rs.61,000/- under section 143(1) of the Income Tax Act, 1961 (hereinafter referred to as `the Act'). The Commissioner thereafter exercised powers under section 263 and issued a show cause notice to the assessee on the ground that the loss of Rs.18,983/had been allowed by the I.T.O. without making proper inquiries. After hearing the assessee, the CIT set aside the order passed by the ITO directing him to reframe the assessment after making proper inquiries. The CIT found that the business loss of Rs.18,983/claimed by the assessee in the return of income was bogus because the said loss was claimed on the basis of purchases alleged to have been made from M/s.K. Surendra & Co.. The subsequent inquiries revealed that although the assessee had produced the bills purported to have been issued by M/s. K. Surendra & Co., the sales and purchases were not recorded in the books of accounts of M/s. K. Surendra & Co. and there was no agreement of sale regarding the goods in question between the assessee and M/s. K. Surendra & Co. Hence, the Commissioner held that the order passed by the ITO on 20-3-1984 was erroneous and prejudicial to the interest of the revenue. Accordingly, the assessment order was set aside and the matter was remanded to the ITO for making fresh assessment after making proper inquiries. The Tribunal allowed the assessee's appeal on the ground that the power under section 263 was exercised by the Commissioner on the basis of the inquiries or material gathered subsequent to the assessment having been completed by the ITO. On the basis of the view which was then prevailing, the Tribunal held that such a material gathered subsequently could not be relied upon for exercising the powers under sec. 263 of the Act. The Tribunal, of course, noted that there was an amendment to sec. 263 enabling the Commissioner to rely upon material gathered subsequently also on account of the Explanation (b) defining "record" as including record relating to any proceeding under the Act available at the time of

examination by the Commissioner but the Tribunal observed that the amendment was made w.e.f 1-6-1988 whereas the assessment year under consideration was 1981-82. Hence, this reference at the instance of the revenue.

3. We have heard Mr Akil Kureshi learned counsel for the revenue and Mr BD Karia learned counsel for the respondent-assessee.

4. Our attention is invited to the decision of the Apex Court in CIT vs. Shree Manjunathesware Packing Products and Camphor Works (1998) 231 ITR 53 wherein the Apex Court has traced the history of legislative amendments to Section 263 and particularly insertion of Explanation (b) by which the expression "record" has been defined as including all records relating to any proceeding under this Act available at the time of examination by the Commissioner, as inserted by the Finance Act of 1988 and the further amendment to that explanation by the Finance Act, 1989, as per which amendment, Explanation (b) now reads as under:-

> "Explanation:- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section-
>
> (b) `record' shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner ;"

The Apex Court has referred to the memorandum explaining the provision in the relevant Finance bill. It was noticed by the Parliament that amendment made by the Finance Act, 1988 was intended to be applicable to all pending proceedings but some of the appellate authorities had taken a view that the explanation was to apply only prospectively i.e. only to those orders which were to be passed by the Commissioner after June 1, 1988. The Parliament, therefore, made its intention clear that the amendment to section 263 by the Finance Act, 1988 was intended to be retrospective and, therefore, it was clarified that the provisions of the Explanation shall be deemed to have always been in existence.

5. In view of the above legislative amendment with retrospective effect, it is obvious that in the facts of the instant case when the Commissioner of Income-tax exercised his powers under sec. 263 of the Act on 4-3-1986, the record available to him for the purpose of

exercise of powers under sec. 263 included all records relating to any proceeding under the Act available at the time of examination by the Commissioner and the record was not to be confined to the record before the ITO at the time of framing the assessment on 28-3-1984.

6. Mr Kureshi learned counsel for the revenue informs us that pursuant to the Commissioner's order dated 4-3-1986 under sec. 263 of the Act, the ITO had reexamined the matter and passed a fresh order of assessment on 25-3-1988 i.e. before the Tribunal passed the order in question on 2-6-1988 allowing the assessee's appeal.

7. In view of the above discussion, it is obvious that once the finding given by the Tribunal about the legality of Commissioner's order dated 4-3-1986 under sec. 263 of the Act goes, the Commissioner's order dated 4-3-1986 stands. We are not expressing any opinion about any subsequent orders passed by the ITO pursuant to the aforesaid order of the Commissioner.

8. In view of the above discussion, we answer the question referred to us in the negative i.e. in favour of the revenue and against the assessee.

9. The Reference accordingly stands disposed of with no order as to costs.

(M.S. Shah,J)

(D.A. Mehta,J)

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